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No. 99-419

In the Supreme Court of the United States

GEORGIA POWER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner committed an unfair labor practice by unilaterally altering the post-retirement medical and life insurance benefits of current, active unit employees without bargaining first with the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-2b) is unpublished, but the judgment is noted at 176 F.3d 494 (Table). The decision and order of the National Labor Relations Board (Pet. App. 1a-6a) and the decision of the administrative law judge (Pet. App. 6a-23a) are reported at 325 N.L.R.B. No. 59.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1999. A petition for rehearing was denied on June 10, 1999 (Pet. App. 1c-3c). The petition for a writ of certiorari was filed on September 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(d) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(d), provides, in pertinent part, that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to * * * confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991).

In *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), this Court explained that, under the NLRA, "mandatory subjects of collective bargaining include pension and insurance benefits for active employees, and an employer's mid-term unilateral modification of such benefits constitutes an unfair labor practice." *Id.* at 159 (footnotes omitted). Although the Court concluded that the employer's bargaining obligation does not extend to a unilateral modification that "concerns, not the benefits of active employees, but *the benefits of already retired employees*" (*id.* at 160 (emphasis added)), the Court made clear that "*the future retirement benefits of active workers* are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining." *Id.* at 180 (emphasis added).

2. Petitioner generates and distributes electric power. For many years, petitioner has maintained a

bargaining relationship with Local 84, International Brotherhood of Electrical Workers, AFL-CIO (Union). The bargaining unit represented by the Union presently consists of approximately 5,000 employees. Pet. App. 6a-7a. Petitioner also employs workers who are not represented by a union. *Id.* at 9a. Historically, all of petitioner's active employees and retirees have been covered by medical and life insurance plans. *Id.* at 2a, 9a. Petitioner and the Union have bargained over medical and life insurance benefits for active unit employees. *Id.* at 2a, 11a-13a. However, the parties' collective bargaining agreements (styled "memorand[a] of agreement") have not included or referred to those benefits. *Id.* at 2a. The Union has also sought to bargain over medical and life insurance benefits for retired, former unit employees, but petitioner has regarded those benefits as "not negotiable," and it has frequently made unilateral changes to the benefits of retired employees, with the Union's apparent acquiescence. *Id.* at 2a, 14a.

On April 21, 1995, during the term of a collective bargaining agreement, petitioner unilaterally placed a limitation on the employer-paid portion of premiums for medical and life insurance benefits for current, active employees who will retire after January 1, 2002. Pet. App. 2a, 7a-8a. That new policy was not applicable to "current retirees." *Id.* at 2a, 8a. Petitioner imposed the limitation "[t]o adjust for changes in accounting rules, which have led to an increase in accounting costs for these benefits of about $70 million annually." *Id.* at 8a. The Union requested bargaining over the benefit changes on the same date that petitioner unilaterally announced them and reiterated that request thereafter. Petitioner, however, refused to bargain with the Union. *Id.* at 2a, 19a.

3. Acting on a charge filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that petitioner committed an unfair labor practice by unilaterally changing the terms and conditions of employment of employees represented by the Union. Pet. App. 7a. After a hearing, the Board, in agreement with the administrative law judge, concluded that "[b]y announcing its planned [benefits] changes, announcing that the changes would be implemented and refusing to bargain regarding current unit employees' future retirement welfare benefits after the Union's request, [petitioner] failed to fulfill its bargaining obligation" under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). Pet. App. 1a, 20a; see also *id.* at 20a-21a. In so concluding, the Board applied its "long-held view," based on this Court's decision in *Pittsburgh Plate Glass Co.*, *supra*, that "future retirement benefits of currently active unit employees are mandatory bargaining subjects, and * * * unilateral changes in those benefits violate Section 8(a)(5)." Pet. App. 3a; see also *id.* at 3a n.4. The Board found that "the prospectively announced changes in retirement benefits will affect currently active unit employees who will retire on or after the announced implementation date, and therefore were mandatory bargaining subjects." *Id.* at 3a.

The Board rejected petitioner's contention that the Union, in the applicable memorandum of agreement (MOA) and benefit plan documents, had waived its right to bargain over changes in the benefits of currently active unit employees. Pet. App. 3a-4a. The Board reasoned that "waivers of statutory rights are not to be lightly inferred, but instead must be 'clear and unmistakable.'" *Id.* at 3a n.5 (quoting *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 708 (1983)). In regard to the MOA, the Board found that "there is no

relevant contract language" because "[t]he MOA does not refer to medical or life insurance benefits." The Board further reasoned that the "[g]eneral language" in the MOA's management-rights clause was "insufficient to establish a waiver of the Union's right to bargain over the changes in question." *Id.* at 4a & n.8. In regard to the benefit plan documents, the Board found that, although they contained language that "reserves to [petitioner] the right to amend or terminate the plans at any time," that language "was never the subject of collective bargaining before the changes at issue were announced." *Id.* at 4a. Accordingly, the Board concluded that the plan document provisions could not be deemed a relinquishment by the Union of "its right to bargain over the changes in post-retirement benefits for current employees." *Ibid.*[1]

Finally, the Board noted that, in attempting to justify its unilateral action, petitioner relied on "numerous court decisions holding that * * * the language of benefit plans is controlling" under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Pet. App. 4a-5a n.9. The Board found that petitioner's cases were "inapposite" because they "did not involve alleged violations of [Section]

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[1] The Board added that the Union "still did not waive its right to bargain" even though "the Union did not protest or demand to bargain over previous unilateral changes in retirement benefits." Pet. App. 4a-5a n.9. The Board explained that, "even if the actions acquiesced in by the Union could be construed as applying to current unit employees rather than retirees," "a union that acquiesces in an employer's unilateral changes in terms and conditions of employment does not irrevocably waive its right to bargain over such changes in the future." *Id.* at 5a n.9.

8(a)(5) of the Act, over which the Board has primary jurisdiction." *Ibid.*[2]

To remedy petitioner's unfair labor practice, the Board ordered petitioner to restore the unit employees' post-retirement medical and life insurance benefits "to the pre-April 21, 1995, level," and to bargain on request with the Union regarding those benefits. Pet. App. 4a, 21a-22a.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the Eleventh Circuit. The court of appeals summarily affirmed the Board's order in an unpublished decision. Pet. App. 1b-2b.

ARGUMENT

The court of appeals' unpublished, summary affirmance of the Board's order is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. The Board's decision in this case rests on a straightforward application of settled law. Applying the principle that "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining" (*Allied Chem. & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971)), the Board found that petitioner's "changes in retirement benefits will affect

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[2] In a separate opinion, Board Member Hurtgen concluded that petitioner's refusal to bargain was an unfair labor practice on different grounds. He found that the Union had waived its "right to bargain about the change announced on April 21," but that petitioner nonetheless acted unlawfully by refusing "to bargain on and after April 21 about rescinding the change." Pet. App. 5a-6a.

currently active unit employees who will retire on or after the announced implementation date, and therefore were mandatory bargaining subjects." Pet. App. 3a & n.4. Because it was "undisputed" that petitioner altered those benefits "unilaterally and without affording the Union an opportunity to bargain over the announced changes," and because the Union had not waived its statutory right to bargain over those changes, the Board reasonably concluded that petitioner's unilateral conduct violated Section 8(a)(5) of the Act. *Id.* at 2a-3a. The Board's determination, which was summarily upheld by the court of appeals, raises no issue warranting further review.

2. Petitioner contends (Pet. 10-14) that the Board's decision is at odds with the congressional intent underlying ERISA. Petitioner notes (Pet. 10-12) that, under ERISA, medical and life insurance benefits (termed "welfare" benefits), unlike pension benefits, are not vested, in order to afford employers the flexibility to address unpredictable costs and economic variables. Therefore, petitioner asserts, it was free, under the reservation-of-rights clause in its benefit plan documents, to modify those welfare benefits without first bargaining with the Union. There is no merit to petitioner's contention.[3]

This Court has explained that, as a general matter, "welfare plans offer benefits that do not 'vest'" for purposes of ERISA. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 514 (1997). That general ERISA principle, however, does

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[3] In this Court, petitioner has abandoned the contention, which was rejected by the Board, that its unilateral action was authorized by the management-rights clause of the MOA. See pp. 4-5, *supra*; Pet. App. 4a n.8.

not control the distinct NLRA issue presented by this case. Whether or not an employer is free under ERISA unilaterally to alter the non-vested benefits of employees who are not represented by a union, nothing in ERISA privileges an employer to ignore its obligation under the NLRA to negotiate with the union representative of current, active employees in a bargaining unit before unilaterally altering their terms and conditions of employment. Indeed, the text of ERISA itself makes clear that ERISA's provisions regarding employee rights under benefit plans do not override the independent rights and obligations established by the NLRA. See 29 U.S.C. 1144(d) (Subchapter I of ERISA "shall [not] be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States"). Simply put, an employee benefit may be both a non-vesting benefit under ERISA and a mandatory bargaining subject under the NLRA.

There is also no merit to petitioner's claim (Pet. 10-14) that the Board's decision in this case conflicts with this Court's ERISA decisions. Indeed, this Court has confirmed that ERISA and the NLRA place distinct legal duties on an employer. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). In that case, the Court held that an employer's ERISA duty to make contractually promised contributions to a pension fund during the term of a collective bargaining agreement is distinct from the employer's duty under the NLRA to continue making such contributions after the agreement has expired and before completion of negotiations for a new contract. The Court explained that "[u]nilateral changes in the terms and conditions of employment are prohibited, not to vindicate the interests that motivated the enactment of [ERISA], but rather to carry out the

purposes of the NLRA," which entails "a broader labor law duty that was created to protect the collective-bargaining process." *Id.* at 553. The Board's decision in this case is entirely in keeping with that principle. None of this Court's ERISA decisions upon which petitioner relies concerns the relationship of ERISA and the NLRA.[4]

Petitioner is also incorrect in asserting (Pet. 14) that the Board "has used its primary jurisdiction over labor-management relations to create a vested right to future retiree welfare benefits." As the Board noted in its decision, the General Counsel did not contend in this case that the unit employees' benefits before April 21, 1995, were "vested." Pet. App. 18a. Nor did he contend that petitioner was required to maintain "a particular level of benefits." *Ibid.* "[T]o vest benefits is to render them forever unalterable," *UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999), and nothing in the Board's decision renders "unalterable" the unit employees' benefits. Rather, the Board has simply ordered petitioner to bargain with the Union, using the

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[4] See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 43 (1987) (addressing whether ERISA preempts certain state common law actions) (cited at Pet. 10); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 88 (1983) (addressing whether ERISA preempts state employment discrimination and disability benefits law) (cited at Pet. 10); *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 75-78 (1995) (addressing whether employer's reservation-of-rights clause "sets forth an amendment procedure that satisfies" ERISA's plan-amendment provisions) (cited at Pet. 11); *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 511-512 (1997) (addressing whether non-vesting benefits are protected by ERISA's prohibition against employer interference) (cited at Pet. 11, 12, 14); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 891 (1996) (addressing whether "the act of amending a pension plan * * * trigger[s] ERISA's fiduciary provisions") (cited at Pet. 13).

benefit level before April 21, 1995, as a baseline for negotiations. See Pet. App. 21a. If, after good-faith negotiations, the parties reach a valid bargaining impasse, petitioner, consistent with the NLRA, may unilaterally implement benefit changes reasonably comprehended within its pre-impasse proposals to the Union. See *Advanced Lightweight Concrete Co.*, 484 U.S. at 543 n.5.[5]

3. a. Petitioner next contends (Pet. 14) that the "unanimous view" of the courts is that "standard reservation of rights provisions, such as those contained in the Company's Plan documents, are fully enforceable under ERISA and in Section 301 [of the Labor Management Relations Act, 1947, 29 U.S.C. 185,] breach of contract actions, and permit employers to unilaterally amend or terminate retiree welfare benefit plans," absent contractual language to the contrary. Accordingly, petitioner argues (Pet. 15), "the outcome would have been quite different" in this case if the Union had challenged petitioner's unilateral benefit changes in federal court under Section 301 or ERISA, rather than before the Board under the NLRA, because the Board "ignored the reservation of rights provisions [and] directly rejected the notion that any contractual rights were at issue." *Ibid.* Petitioner is incorrect.

The Board neither "ignored" the reservation-of-rights provision contained in the plan documents nor "rejected" the possibility that petitioner may have secured from the Union a contractual right unilaterally to change the unit employees' benefits. Rather, the

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[5] For the same reason, petitioner errs in contending (Pet. 27) that the Board "has relied on *Pittsburgh Plate Glass* to vest otherwise non-vested retiree welfare benefits, without even limiting the vesting to the expiration of the current labor agreement."

Board specifically examined the reservation-of-rights provision and the parties' collective bargaining agreement. The Board found that the agreement "does not refer to medical or life insurance benefits," and that "the 'reservation of rights' language in the benefits plans * * * was never the subject of collective bargaining." Pet. App. 4a. In those circumstances, the Board properly concluded that neither the unbargained-for reservation-of-rights provision in the benefit plans nor the collective bargaining agreement excused petitioner's obligation under the NLRA to bargain with the unit employees' union representative before changing their benefits. *Ibid.* Petitioner's disagreement with the Board's conclusion derives from its mistaken belief that ERISA preempts any bargaining obligation imposed on petitioner by the NLRA. See pp. 7-8, *supra*.

Nor is petitioner aided by any of the cases upon which it relies (Pet. 14-18). As we explain at pages 9-10, *supra*, the Board did not conclude in this case that an employer can never unilaterally change the benefits of its employees. Rather, the Board concluded only that an employer must bargain with the union representative of current, active employees before unilaterally changing their benefits, and that obligation is not relieved by reservation-of-rights language in a document that is not the product of collective bargaining. None of the decisions cited by petitioner addresses the questions that the Board decided in this case, and there is no reason to believe that the courts that issued those decisions would decide the questions in this case differently than the Board and the court below.

b. Petitioner also asserts (Pet. 18) that "[t]he Circuits are essentially split evenly on the effect, if any, a collective bargaining agreement has on both the vesting of future retiree welfare benefits, and the ability of an

employer to unilaterally change such benefits." See also Pet. 28-30 (making same claim). Whether or not petitioner's assertion of a conflict among the courts of appeals is accurate, this case does not present the question on which the cases cited by petitioner allegedly disagree. Those cases address the question whether the collective bargaining agreements at issue granted retired employees a vested right to receive lifetime health benefits.[6] Here, the Board did not address the rights of petitioner's retired employees under the collective bargaining agreement, and it did not decide whether any employee had vested rights to benefits. Rather, the Board concluded that petitioner violated its NLRA bargaining obligations toward its current, active unit employees by changing their post-retirement benefits without first bargaining with the union. See Pet. App. 2a-3a.

4. Petitioner further claims (Pet. 21-26) that the Board applied an erroneous legal standard in determining that the Union had not relinquished its right to

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[6] Compare, *e.g.*, *UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (applying inference that "when the parties contract for benefits which accrue upon achievement of retiree status * * * the parties likely intended those benefits to continue as long as the beneficiary remains a retiree") (cited at Pet. 18, 28), cert. denied, 465 U.S. 1007 (1984); *Keffer* v. *H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989) (finding that parties "intended the benefits in question to extend beyond the expiration of the collective bargaining agreement") (cited at Pet. 18 n.7) with, *e.g.*, *Skinner Engine Co.*, 188 F.3d at 141 (interpreting "the relevant portions of the [collective bargaining agreements] without the benefit of the inference established by *Yard-Man*") (cited at Pet. 19 n.8, 28-29); *Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560, 567 (7th Cir. 1995) (labor agreements and plan documents negotiated by parties did not confer on retired employees a vested right to lifetime health benefits) (cited at Pet. 18).

bargain over the benefit changes at issue in this case. According to petitioner, the Board should have applied the "contract analysis" that has been applied by several courts of appeals rather than the "'clear and unmistakable waiver' analysis" that the Board used here. See Pet. 21 (citing, *e.g.*, *Chicago Tribune Co.* v. *NLRB*, 974 F.2d 933 (7th Cir. 1992)). Petitioner, however, is jurisdictionally barred from raising that claim in this Court, because petitioner failed to raise its objection before the Board. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered" on judicial review "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982).[7]

This case would not present an appropriate vehicle for this Court to address petitioner's claim in any event, because the Union did not relinquish its bargaining rights even under the "contract analysis" now urged by petitioner. Under that analysis, "the contract will control" if the union has "agree[d] to the clause" in question and the clause "fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining." *Chicago Tribune Co.*, 974 F.2d at 937. Those conditions were not met here. As previously noted, the Board found that the reservation-of-rights clause in the benefit plan documents "was never the subject of

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[7] Before the Board, petitioner claimed that the administrative law judge had "erred in concluding that the Union never waived its right to bargain." Petitioner acknowledged that "such a waiver must manifest itself through 'clear and unmistakable' conduct," but contended that "the Company has amply shown that the Union has exhibited such conduct." Brief in Support of Respondent Georgia Power Company's Exceptions to Administrative Law Judge's Decision 41 (Mar. 17, 1997).

collective bargaining." Pet. App. 4a. Accordingly, the Union did not "agree[] to the clause." *Chicago Tribune Co.*, 974 F.2d at 937. Moreover, as the Board found (Pet. App. 4a), the parties' collective bargaining agreement did not contain any provision relating to medical or life insurance benefits. Accordingly, the agreement did not "fully define[] the parties' rights" in regard to those benefits. *Chicago Tribune Co.*, 974 F.2d at 937. Thus, the alleged disagreement on the governing standard for analysis of cases like this one would not have affected the outcome here.[8]

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[8] Petitioner also contends (Pet. 20-21, 24) that the Board's decision here conflicts with prior Board decisions that have applied "contract analysis." Even if petitioner were correct, the Board rather than this Court should resolve any inconsistency among the Board's decisions. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no merit to petitioner's contention of conflict: the Board decisions petitioner cites do not suggest that benefit plan documents that are not the product of collective bargaining can authorize an employer to change the benefits of active employees without first bargaining with their union representative. See *McDaniel Ford, Inc.*, 322 N.L.R.B. 956, 963 (1997) (employer violated Section 8(a)(5) by unilaterally eliminating employee incentive plan, where the plan, though not included in the collective bargaining agreement, had been "applied to the mechanics for many years") (cited at Pet. 20-21); *Shane Felter Indus.*, 314 N.L.R.B. 339, 347 (1994) (employer violated Section 8(a)(5) by unilaterally reducing reimbursement rate for a prescription drug, where employer had "reimbursed claims for [the drug] at the rate [of] 100 percent for more than 3 years") (cited at Pet. 20); *Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 586, 615 (1990) (no duty to bargain over change in benefits of *retired* employees) (cited at Pet. 24); *Amoco Chem. Co.*, 328 N.L.R.B. No. 174 (Aug. 18, 1999), slip op. 2-3 (reversing administrative law judge's decision (cited at Pet. 24 n.11) based on Board's decision in the instant case), petition for review pending, No. 99-1368 (D.C. Cir.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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